

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 5, 2006 Session

**KATHYRN MONTGOMERY v. THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY, ET AL.**

Appeal from the Chancery Court for Davidson County
No. 04-998-III Ellen Hobbs Lyle, Chancellor

No. M2005-02824-COA-R3-CV - Filed October 22, 2007

On a petition for writ of certiorari, the trial court held that the Benefit Board misconstrued or failed to follow its policy when denying the petitioner's request for disability benefits. Consequently, the trial court granted petitioner's application for disability benefits. We reverse because we cannot conclude that the Benefit Board acted arbitrarily in how it construed and or applied its internal policy. We also conclude that the request for disability benefits is governed by Tenn. Code Ann. § 27-9-114, and, accordingly, the matter should be remanded to the Benefit Board to conduct a contested case hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. joined. WILLIAM B. CAIN, J., not participating.

Kevin C. Klein, John L. Kennedy, Nashville, Tennessee, for the appellant, The Metropolitan Government of Nashville and Davidson County.

Alfred H. Knight, A. Russell Willis, Nashville, Tennessee, for the appellee, Kathryn Montgomery.

OPINION

Ms. Montgomery filed a petition for a writ of certiorari seeking review of an administrative decision by the Metropolitan Employee Benefit Board ("Board") denying her request for a medical disability pension, *i.e.*, disability benefits. As grounds for her petition, Ms. Montgomery argued, among other things, that since the Board's decision was in violation of its own policy, it was illegal, arbitrary, and capricious.

I. FACTS

The following facts are from the record developed before the Board. Ms. Montgomery began her employment with the Metropolitan Government of Nashville and Davidson County ("Metro") in September of 1998 at the Metro Police Academy where she trained police officers in first aid and conducted daily exercise programs for its officers. In February of 2003, Ms. Montgomery's endocrinologist, Dr. Bomboy, determined that Ms. Montgomery was not capable of gainful employment.¹ Ms. Montgomery was diagnosed with restless leg syndrome, hypertension, vascular heart disease, irritable bowel syndrome, anemia, Graves' disease, Reynard's Disease, cervical spine disorder and mental health conditions resulting from an attack on her second job. Consequently, in March of 2003, Ms. Montgomery applied to the Board for a medical disability pension.

The Board's staff reviewed Ms. Montgomery's application and on March 24, 2003, recommended that Ms. Montgomery undergo independent medical evaluations. While Ms. Montgomery's physician had concluded that she was disabled, the independent doctors who examined Ms. Montgomery reached a different conclusion. As part of the independent medical evaluations, Ms. Montgomery was seen by two physicians. Dr. Nichols, a certified independent medical examiner, submitted his report to Board staff on May 13, 2003. After discussing Ms. Montgomery's case at length, Dr. Nichols concluded "it is my opinion that she can continue her normal job activities although she is motivated not to do so. Her primary motivation is to obtain permanent disability status. . . ." The second independent medical examiner, a psychiatrist, Dr. Griffin, saw Ms. Montgomery on June 10, 2003. Dr. Griffin concluded "her psychiatric condition would not prevent her from working on a full time basis. She seems convinced that she cannot and will not return to work, this obviously creates motivational difficulties." In August of 2003, Metro's Civil Service Medical Examiner, Dr. Fletcher, reviewed Ms. Montgomery's records and concluded that he agreed with the evaluations by the two independent examiners. Based on these independent medical evaluations, the Board's staff recommended in June and September of 2003 that the Board deny her application for benefits.

Ms. Montgomery had simultaneously applied for social security disability benefits. The Social Security Administration ("SSA") granted Ms. Montgomery's application for social security benefits on September 22, 2003. The Board's staff was notified of this approval in October of 2003.

The Board and its pension committee considered Ms. Montgomery's applications at nine (9) meetings spanning eleven (11) months. It is clear from the transcripts of these meetings, which are a part of the record, that the Board understood that normally when an applicant had been granted social security benefits the Board did not require independent medical evaluations and that the Board, in effect, usually deferred to the social security administration decision. Ms. Montgomery's representatives were allowed to address both the Board and its pension committee. After much

¹Ms. Montgomery's other physicians were not able to reach the same conclusion. Her psychiatrist stated he believed Ms. Montgomery had no psychological problems that prevented her from working. Her internist, Dr. Edwards, basically said he believed his patient and supported her request.

discussion and debate surrounding the social security issue, the Board ultimately denied Ms. Montgomery's application based on the medical evidence that she was not disabled.

Finally, at the Board meeting on March 2, 2004, the Board staff notified the Board of the existence of a 1992 Policy "where the board directed staff if . . . some individual was approved for Social Security Disability that the staff should recommend that the pension be approved without stipulation of reexam." Based on this information, Ms. Montgomery's application was brought before the Board for reconsideration. It was noted at that meeting that the independent medical exams in her case were performed prior to the social security decision. Ms. Montgomery's counsel was allowed to address the Board on this occasion as well. The Board voted to let its decision to deny the disability benefits stand.

Ms. Montgomery then filed a petition for a writ of certiorari asking the trial court to review the Board's decision on several grounds, including the allegation that the Board's failure to follow its policy on the social security disability issue was arbitrary, capricious, and illegal.²

In its review of the Board's decision, the trial court allowed the parties to supplement the Board's record to admit the 1992 Policy and five other proceedings before the Board where the 1992 Policy had been applied. These matters are a part of the record since they were considered and discussed by the Board at its final March 2004 meeting.³ The trial court also allowed the parties to supplement the record with the testimony of Edna Jones who supervised the disability application process and John Kennedy, Assistant Director of the Board.

On November 7, 2005, the trial court found "as a matter of law" that the 1992 Policy "requires that an application for Metro disability benefits shall automatically be approved upon approval for SSA benefits." The trial court found the wording of the policy to be "absolute and unconditional," *i.e.*, not linked to a favorable recommendation of the Metro Civil Service physician. Additionally, the trial court found that the Board had "uniformly", or "generally", applied the 1992 Policy, finding that the record evidenced a "steady pattern of deference to the Social Security Administration's determination of disability."

The trial court found that the denial of Ms. Montgomery's application deviated from the policy and past practice and was, therefore, arbitrary. Finding this issue dispositive, the trial court did not address any other issue raised by Ms. Montgomery in her petition. The trial court reversed the Board's decision and granted Ms. Montgomery's request for disability benefits. The Metropolitan Government appealed.

²The petitioner also alleged other errors by the Board necessitating reversal including that its decision was not supported by material evidence.

³Metro objects on the ground that the Board chose not to reconsider its decision so the Board did not consider the records. However, the records were discussed and disclosed to the Board. Moreover, Ms. Montgomery's counsel requested at that meeting that this material be part of the Board's record for purposes of judicial review.

II. ADMINISTRATIVE PROCEDURES ACT

Before we address the issues originally raised by the parties, we must address the potential applicability of Tenn. Code Ann. § 27-9-114 and a recent Tennessee Supreme Court decision. Ms. Montgomery filed for judicial review of the Board's decision under the common law writ of certiorari procedure. Neither of the parties nor the trial court raised the issue of whether, under Tenn. Code Ann. § 27-9-114, the matter should have been reviewed under the Administrative Procedures Act, Tenn. Code Ann. § 4-5-301 *et seq.* ("APA").

As amended in 1988, and effective in 1989, Tenn. Code Ann. § 27-9-114 provides as follows:

- (a)(1) Contested case hearings by civil service boards of a county or municipality which affect the employment status of a civil service employee shall be conducted in conformity with contested case procedures under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 3.
- (2) The provisions of this subsection pertaining to hearings by civil service boards shall not apply to municipal utilities boards or civil service boards of counties organized under a home rule charter form of government.
- (b)(1) Judicial review of decisions by civil service boards of a county or municipality which affects the employment status of a county or city civil service employee shall be in conformity with the judicial review standards under the Uniform Administrative Procedures Act, § 4-5-322.
- (2) Petitions for judicial review of decisions by a city or county civil service board affecting the employment status of a civil service employee shall be filed in the chancery court of the county wherein the local civil service board is located.
- (3) In any appeal pursuant to this section deemed by the court to be frivolous, the sanctions of the Federal Rules of Civil Procedure, Rule 11 may be applied by the chancellors.

Prior to the 1988 amendment, review of local government decisions about employment status was by common law writ of certiorari. *Tidwell v. City of Memphis*, 193 S.W.3d 555, 559 (Tenn. 2006).

The Tennessee Supreme Court in *Tidwell* was presented the issue of whether Tenn. Code Ann. § 27-9-114 required application of the APA to Shelby County employees who applied for benefits for on the job injuries. *Id.* at 557-58. A decision by the City's Risk Manager had been appealed to the "On the Job Injury Benefits Panel" ("OJI Panel"), which denied benefits. *Id.* at 558-59. The employees sought judicial review of the benefit denial in the trial court under both the common law and statutory writ of certiorari. *Id.* at 558. The trial court, however, concluded that

under Tenn. Code Ann. § 27-9-114, the APA applied to proceedings before and appeal of the OJI Panel. *Id.* The Court of Appeals reversed, finding the OJI Panel was not subject to Tenn. Code Ann. § 27-9-114 since it was not a civil service board.

The Supreme Court in *Tidwell* developed a two part test to determine the applicability of Tenn. Code Ann. § 27-9-114. “In order for section 27-9-114(a)(1) to apply, there must (1) be a proceeding before a ‘civil service board’ and (2) a decision that affects the ‘employment status’ of a civil service employee.” *Tidwell*, 193 S.W.3d at 559.

The Court in *Tidwell* found that qualifying as a “civil service board” under the APA did not require technical designation as such. *Id.* at 562. After reviewing other legislative definitions of “civil service board,” the Court held that civil service boards “hear administrative appeals and determine benefits to which an employee may be entitled.” *Id.* Furthermore, the Supreme Court defined “employment status” as encompassing the “entire legal relation of the employee to the employer.” *Id.* at 563 (quoting *Love v. Ret. Sys. of the City of Memphis*, 1987 WL 17246, at *1 (Tenn. Ct. App. Sept. 21, 1987)).

The Supreme Court held that the city’s OJI Panel was a civil service board whose decisions affected the employment status of workers. Consequently, both the proceedings before the city’s panel and any judicial review of a panel decision were governed by the APA. *Tidwell*, 193 S.W.3d at 563-64. Because the panel’s proceedings did not comply with the requirements of the APA, the case was remanded for new proceedings before the city’s OJI Panel with direction that the city comply with the Administrative Procedures Act.

In the case before us, the trial court had made its decision in November of 2005, while the *Tidwell* decision was rendered later in May of 2006. Consequently, the impact of *Tidwell* was not raised in the trial court. Neither was it addressed in the briefs or arguments in this appeal, although *Tidwell* was decided well before argument herein. Subsequently, this court requested the parties to submit supplemental briefs on the issue whether the *Tidwell* decision made Tenn. Code Ann. § 27-9-114 applicable to this case and, if so, the consequence.⁴

Both parties agree that pursuant to *Tidwell*, the Board was sitting as a civil service board affecting the employment status of Ms. Montgomery, thus invoking the application of Tenn. Code Ann. § 27-9-114. We agree. Consequently, the Board’s proceedings are governed by the APA, such that the Board should have heard the matter as a contested case hearing, the appeal of which is governed by Tenn. Code Ann. § 4-5-322. Both parties concede that the proceedings before the

⁴In *Tidwell*, the Court alluded to the applicability of Tenn. Code Ann. § 27-9-114 to proceedings before the Metropolitan Benefit Board, distinguishing the case relied on in *Tidwell* by the Court of Appeals, *Pardue v. Metro. Gov’t of Nashville & Davidson County*, No. 01A01-9707-CH-00312, 1998 WL 173208 (Tenn. Ct. App. Apr. 15, 1998), on the basis that the court in *Pardue* had not addressed whether the pension board was effectively sitting as a civil service board for purposes of section 27-9-114. *Tidwell*, 193 S.W.3d at 561, n.7.

Board were not conducted as a contested case hearing and that the trial court did not review the decision under the APA.

It is important to recognize that the conclusion that the Administrative Procedures Act applies to Ms. Montgomery's application for disability benefits affects not only the standard of review to be applied in the trial court and this court, it also changes the fundamental nature of the proceedings before the Board. As the Supreme Court noted in *Tidwell*, if the local government entity's proceedings were not in compliance with the contested case provisions of the APA, then the decision was "made upon unlawful procedure," one of the grounds for reversal listed in Tennessee Code Annotated § 4-5-322(h). *Tidwell*, 193 S.W.3d at 560 and 564. While *Tidwell* suggests that the appropriate remedy in an appeal from a trial court's review of a local civil service board decision that was the product of proceedings that did not comply with the APA's contested case requirements is remand for a Board proceeding that does comply, the parties in the case before us suggest a somewhat different approach.

Ms. Montgomery argues that if this court affirms the trial court's award of benefits, then the fact that the Board proceedings violated the APA should be considered "harmless error." However, if this court should reverse the trial court, Ms. Montgomery argues that the matter should be remanded for a contested case hearing.

The Board agrees with Ms. Montgomery that its failure to comply with the contested case hearing requirement is "harmless error." According to the Board, however, whether the review is by certiorari or under the APA, the trial court erred when it concluded as a matter of law that the Board was required to grant Ms. Montgomery benefits. The Board asks the court to reinstate its decision denying benefits.

Consequently, both parties assert that if we affirm the trial court's decision, there should be no remand. If we reverse, the parties disagree as to the appropriate relief. In our view, however, this reasoning puts the cart before the horse. We must first decide whether we can and should review the trial court's decision in the face of the undisputed conclusion that the Board did not conduct its proceedings on Ms. Montgomery's application for benefits in accordance with the APA.

As we understand the parties' positions, they agree that this court can and should review the trial court's legal conclusion as to its interpretation of the 1992 Policy "as a matter of law." Because that portion of the trial court's ruling involves interpretation of the policy and its applicability, the Board's failure to follow the contested case requirements of the APA has no effect on our review. Additionally, we interpret the parties' positions as also asserting that we can and should review the trial court's holding that the Board's failure to follow the Policy, as interpreted by the trial court, was arbitrary because it was a departure from past practice.

We agree with the parties that if we merely vacate the trial court's judgment and remand the case for a new contested case hearing by the Board, without considering the issues discussed above, the Board will be presented on remand with the same issue as before, *i.e.*, whether the Board is required by the 1992 Policy, and/or its prior application, to grant Ms. Montgomery benefits. We also

agree that those issues should, therefore, be addressed in the interest of judicial economy and for the sake of the litigants.

IV. ANALYSIS

Both parties now assert that we should review the trial court's judgment using the standard found in the APA and set out in Tenn. Code Ann. § 4-5-322(h). The trial court applied the common law writ of certiorari standard,⁵ and based its decision on the "arbitrary and capricious" element of that standard. The APA's standard of review includes a similar ground for reversal of an agency decision that is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Tenn. Code Ann. § 4-5-322(h)(4). The APA's "arbitrary and capricious" standard has been described as follows:

In its broadest sense, the standard requires the court to determine whether the administrative agency has made a clear error in judgment. *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413, 103 S.Ct. 1921, 1928, 76 L.Ed.2d 22 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, *State ex rel. Nixon v. McCanless*, 176 Tenn. 352, 354, 141 S.W.2d 885, 886 (1940), or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175, 180 (1991); *Ramsey v. Department of Human Servs.*, 301 Ark. 285, 783 S.W.2d 361, 364 (1990).

Jackson Mobilephone Company, Inc. v. Tennessee Public Serv. Comm., 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993). An administrative decision that is not supported by substantial and material evidence may also be considered arbitrary or capricious.⁶ *Id.*

As a general proposition, the decision of an administrative board is considered to be arbitrary if it lacks a rational basis. *Mobilcomm of Tenn. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 101, 104 (Tenn. Ct. App. 1993). Further, arbitrariness conveys the sense that a decision is not based on any course of reasoning or exercise of judgment, but is based solely on one's will. *State ex rel. Nixon v. McCanless*, 176 Tenn. 352, 354, 141 S.W.2d 885, 886 (1940). Arbitrary has also been characterized as "without fair, solid, and substantial cause; and without reason given," *Waller v. Skelton*, 186 Tenn. 433, 445, 211 S.W.2d 445, 450 (1948), and "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case, or the result of an

⁵That is how the lawsuit was brought, and no party suggested the application of any other standard.

⁶Additionally, under the common law writ standard, a decision that is not supported by any substantial and material evidence is also considered arbitrary. *South v. Tennessee Bd. of Pardons*, 946 S.W.2d 310, 311 (Tenn. Ct. App. 1996).

unconsidered willful and irrational choice of conduct.” *Wright v. Tennessee Bd. of Dispensing Opticians*, 759 S.W.2d 929, 932 (Tenn. Ct. App. 1988).

For purposes of deciding the issues raised in this appeal, there is no real difference between the “arbitrary and capricious” standard under the APA and the same standard under the common law writ of certiorari. See *Terminix International Co., L.P. v. Tenn. Dept. of Labor*, 77 S.W.3d 185, 190 n. 10 (Tenn. Ct. App. 2002); *Brunetti v. Bd. of Zoning Appeals of Williamson County*, No. 01A01-9803-CV-00120, 1999 WL 802725, at *3 (Tenn. Ct. App. Oct. 7, 1999) (no Rule 11 perm. app. filed).

The question before us is whether the Board’s decision to deny Ms. Montgomery’s request for disability retirement benefits was arbitrary, as the trial court found, because either (1) it violated a clear and unequivocal policy of the Board or (2) it was a deviation from past practice interpreting or applying that policy. In answering this question, we will apply the standard for arbitrariness discussed above.

The policy relied upon by the trial court is not found in an ordinance or formally promulgated regulation, but apparently was a rule of thumb, in the form of a directive to the staff, used by the Board in processing requests for disability when the SSA had previously approved the applicant as qualifying for federal disability benefits. This policy (“1992 Policy”) is found in the May 11, 1992 Board minutes, which provide as follows:

The Executive Secretary stated that the [Pension] committee had voted to recommend to the board that **when an individual has been approved for Social Security Disability benefits, the Board Office automatically be allowed to place that individual on the Board agenda to be approved with no stipulation of scheduled reexamination**, and that the individual be brought before the Board when notification is received that Social Security Disability benefits have ceased.

A vote was taken, and the recommendation of the [Pension] committee was approved, unanimously, by the Board.

(emphasis added).

In the case before us, the Board did not interpret this policy as requiring it to grant Ms. Montgomery’s application or as requiring it to approve disability benefits where SSA benefits have been granted, regardless of other evidence or of timing.

The Policy provides that when a person has been awarded social security disability benefits by the SSA, then the Board staff is automatically “allowed” to place that person on the agenda to be approved without further medical examination. The Policy does not govern Board action on the recommendation. It does not state that approval of social security benefits will automatically require approval by the Board of disability benefits or that the Board cannot consider evidence other than

the SSA finding which may indicate that the applicant does not meet Metro's disability qualifications.

Further, in Ms. Montgomery's case, the independent medical evaluation had been requested and had taken place *before* the grant of social security disability benefits. The Policy did not require that the Board staff take no action on Ms. Montgomery's application while her social security application was pending. Therefore, the staff proceeded appropriately when it obtained the medical evaluations. Furthermore, the 1992 Policy does not require that the Board ignore independent medical evaluations obtained before the social security disability benefits are awarded.

Consequently, we conclude that the Board had discretion to interpret its own internal policy and that its interpretation was not arbitrary.

As to past practice applying the Policy, after taking evidence on such practice, the trial court noted that Ms. Montgomery's case was the first time this particular fact situation had presented itself. Specifically, the trial court's order stated that "The Board has never been faced with the precise situation presented by the Petitioner: an unfavorable recommendation by Metro's Civil Service physician prior to notice of SSA approval."

Consequently, we cannot conclude that the Board's decision that it was not required to apply the policy so as to grant Ms. Montgomery's application regardless of the other evidence was arbitrary. Since this was a matter of first impression before the Board, the Board's decision was not a deviation from past practice or application.

We reverse the trial court's judgment finding the Board's decision to deny disability benefits to have been arbitrary. We find that neither the wording of the 1992 Policy nor the past application of that Policy by the Board required the Board to award Ms. Montgomery the benefits she requested.

Our reversal, however, does not result in reinstatement or affirmance of the Board's decision. Pursuant to *Tidwell*, as discussed above, this case is remanded to the trial court for remand to the Board with instructions that it proceed with consideration of Ms. Montgomery's request in accordance with the Administrative Procedures Act.

V. CONCLUSION

The trial court is reversed. The trial court shall remand this matter to the Board so it may hold a contested case hearing on Ms. Montgomery's request. Costs of this appeal are taxed equally between the parties, Kathryn Montgomery and the Metropolitan Government.

PATRICIA J. COTTRELL, JUDGE